1992

Bruce Goodmansen and Wilma Goodmansen v. Liberty Vending Systems, Inc. and Howard Abrams, et al : Brief of Appellant

Utah Court of Appeals

William B. Parsons III; Attorney at Law; Attorney for Appellants.
Bruce Goodmansen; Pro Se; Respondent.

IN THE UTAH COURT OF APPEALS

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs/Respondents, -vs- LIBERTY VENDING SYSTEMS, INC., and HOWARD ABRAMS, et al., Defendants/Appellants.	Case No. 920156-CA Priority No. 16

BRIEF OF APPELLANTS

APPEAL FROM FINAL JUDGMENT
OF THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE JUDGE JAMES S. SAWAYA

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IN THE UTAH COURT OF APPEALS

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs/Respondents, -vs- LIBERTY VENDING SYSTEMS, INC., and HOWARD ABRAMS, et al., Defendants/Appellants.	Case No. 920156-CA

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STATEMENT OF ISSUES ON APPEAL

The Appellant purports the following issues are those primarily raised in this appeal.

1. That the Code of Judicial Administration, Rule 4-504(8), precludes from enforcement an entry of an Order and Judgement enforcing an unsigned, unaccepted, and unrecorded proposed Stipulation.

2. That the case of Brown v. Brown, 744 P.2d 333, (Utah App. 1987) is sufficiently similar to this case on appeal as to be legally indistinguishable; and therefore, the negotiations and contact between the parties did not give rise to a level of contact and conduct which would submit the Defendants/Appellants herein to an Order and Judgment enforcing the proposed Stipulation herein.

STATEMENT OF FACTS

In this case, the Plaintiffs brought an action against the Appellants and Appellants' Co-Defendants for the claims arising out of payments made by the Plaintiffs to the Defendants for vending machines that the Plaintiffs alleged were non-conforming, or not tendered.

Thereafter, on or about the 18th day of March, 1991, a Pre-trial was conducted in the lawsuit. Following the Pre-trial, a series of conversations existed between Barry G. Lawrence, attorney for the Plaintiffs, and Dean Becker, attorney for the Defendants. Those conversations were sometimes memorialized by letter between

said parties. Those conversations conducted between the attorneys for the respective parties led to the preparation of a document entitled General Release and Settlement Agreement and a companion instrument entitled Promissory Note. That General Release and Settlement Agreement and Promissory Note were prepared by Barry G. Lawrence or others in his office, for and in behalf of the Plaintiffs, and were subsequently directed to the Defendants, through the Defendant's attorney, Dean Becker. No evidence exists that Appellants counsel is presently aware of that suggests that the Appellants engaged in a face-to-face confrontation or settlement negotiation as was described in Zion's First National Bank v. Barbara Jenson Interiors 781 P.2d, 478 (Utah App. 1989), nor did the Appellants participate in a declaration of a settlement or a reading of a settlement in their presence, by their counsel or counsel for the Plaintiffs, permitting them the opportunity of open acceptance or rejection as was factually the case in Brown v. Brown, 744 P.2d, 333, (Utah App. 1987).

In the document entitled Reply Memoranda in Support of Plaintiffs Motion to Enforce the Settlement Agreement, prepared by Barry G. Lawrence or others associated with his firm, Plaintiffs counsel, in their own instrument, state on page 2, under Paragraph 1 of the Argument: "However, Abrams counsel reached an agreeable settlement with Plaintiffs counsel for Fifty-five Thousand Dollars ($55,000.00)." Plaintiffs counsel recognizing in his own arguments before the District Court Judge, in support of his Motion to Enforce the Settlement Agreement, that the negotiations between the parties were a matter of discourse between counsel.

No contention exists that the Stipulation or the accompanying Promissory Note were ever signed by the Defendants/Appellants herein.

Unarguably, Howard Abrams and Liberty Vending Systems, Inc., refuse to sign the General Release and Settlement Agreement and accompanying Promissory Note, reputiated its terms and conditions, and objected to the Plaintiff's Motion to Enforce Settlement Agreement, as evidence by the Memoranda in Opposition to Motion to Enforce, submitted by Edwin F. Guyon, substitute counsel for Defendants.

Needless to say, the matter was submitted to Judge Sawaya for his decision, who determined that the Settlement Agreement was in fact enforceable, and so ordered. An appeal from that Order of the Court was timely filed, Notice of Appeal having been submitted to the Third District Court on the 5th day of July, 1991.

It is from these facts and circumstances that this appeal is taken.

SUMMARY OF ARGUMENTS

The Appellant respectfully submits that a settlement agreement was not reached between the parties during the period in which settlement negotiations existed from approximately the 7th day of March, 1991 to the 6th day of June, 1991; the dates when the settlement negotiations began and the Final Judgment was entered, respectively.

The Appellant's argument is supported by an analysis of the facts, those letters transmitted between counsel, the silence of the Defendant Liberty Vending Systems, Inc., and the Defendant Howard Abrams and their failure to sign the Settlement Agreement and Integrated Promissory Note.

Settlement negotiations were engaged in and reached a point where proposed Settlement Agreement and the proposed Integrated Promissory Note were completed and were submitted to Dean H. Becker, attorney for the Defendants Howard Abrams and Liberty Vending Systems, Inc., Appellants herein. Those settlement negotiations did not reach the level of interaction found in the case of Zions First National Bank v. Barbara Jenson Interiors, 781 P.2d 478 (Utah App. 1989). A level of activity associated with these settlement negotiations was more closely aligned to those factual circumstances the Utah Court of Appeals found to be insufficient to enforce the settlement agreement as described in the case of Brown vs. Brown, 744 P.2d 333, (Utah App. 1987).

POINT I

CODE OF JUDICIAL ADMINISTRATION, RULE 4-504(8) PRECLUDES ENFORCEMENT OF THIS PROPOSED STIPULATION

Rule 4-504(8), the Code of Judicial Administration, provides as follows:

> "No Orders, Judgments or Decrees, based upon Stipulation shall be signed or entered unless the Stipulation is in writing, signed by the attorneys of he attorneys of record for the respective parties, and filed with the clerk where the Stipulation was made, on the record."

In our case, the Stipulation in question is in writing, but has not been signed by the attorneys of record for the respective parties, nor has it been signed by the parties themselves, nor has it been made a part of the record by the clerk of the court, by a filing of the same. Each of those elements required under said rule, become fatal flaws when one fails to comply therewith. Accordingly, the Stipulation in this instance, under said rule, is fatally flawed. In Brown v. Brown, 744 P.2d, 333, (Utah App. 1987), the Court has upheld the responsibility of compliance with the terms of this rule. There in the Court of Appeals expressly held that Settlement Agreements must be in the form of a written Stipulation to be enforceable. In Brown v. Brown, 744 P.2nd, 333, the Court of Appeals so ruled in applying Rule 4.5(b) of the Rules of Practice, in the District Courts and Circuit Courts, which was the predecessor to the Code of Judicial Administration, Rule 4-504(8) as quoted.

POINT II

IN SUCCESSIVE CASES WITH BARELY DISTINGUISHABLE CHARACTERISTICS, THE UTAH COURT OF APPEALS HAS BOTH FOUND FOR THOSE WISHING TO AVOID THE ENFORCEMENT OF AN UNSIGNED SETTLEMENT AGREEMENT AND THOSE WISHING TO SEEK THE ENFORCEMENT OF THE SAME

Two leading cases from the Utah Court of Appeals, within two years of one another, have addressed the very issue presented upon appeal in this matter. In Jenson, 781 P.2d 478, the Court upheld a settlement agreement that had not been signed nor read into the record before the Court and approved by the Judge, based upon the

the following facts. At the time of the scheduled deposition on the Jensons, the Jensons and their attorney, while attending said depositions, engaged in settlement negotiations. Those settlement negotiations culminated in a Settlement Agreement. Those settlement negotiations were face-to-face between the Jensons, their attorney, and the attorney for Zions First National Bank. The Jensons thereafter reputiated the Settlement Agreement, claiming that the negotiations resulted only in a "proposed" settlement. The Jensons refused to sign said agreement and an enforecement action in the form of a Motion to Compel Settlement was brought before the Court. Judge Raymond S. Uno, of the Third Judicial District Court, enforced the agreement reached between the Jensons, their counsel, and the attorney for Zions, which issue was appealed to the Utah Court of Appeals and Judge Uno's decision was confirmed. It is important to note that in a concurring opinion, Judge Davidson strongly criticized the obvious conflict between the existence of Rule 4-504(8) of the Code of Judicial Administration and the Court's Order in Jenson, 781 P.2d, 478. Judge Bench, in a concurring and dissenting opinion, however, indicated that he saw no distinguishing characteristics between Jenson, 781 P.2d, 478, and Brown, 744 P.2d, as cited above. Judge Bench indicated his belief that the provisions of Rule 4-504(8) of the Code of Judicial Administration precluded the enforcement of the settlement in Jenson, 781 P.2d, 478, in conformity with the Courts prior decision in Brown, 744 P.2d, 333.

In Brown, 744 P.2d, 333, the Court of Appeals in reviewing a case brought before it, that had previously been heard by James S.

Sawaya Jr., the judge in our case at bar, reversed Judge Sawaya's Order enforcing the unsigned Stipulation and remanded to the trial Court for further action. Factually in Brown, 744 P.2d, 333, the Court found itself examining a circumstance where at the time and place set for Plaintiffs Deposition, Plantiff's attorney, with his client present, together with a Certified Shorthand Reporter, and the attorney for the Defendant, read into the record, before said Certified Shorthand Reporter, a Stipulation. The Plaintiff herself did not speak during the course of the Stipulation being reduced to a record before the Certified Shorthand Reporter, but both counsel spoke, as did the Defendant. The written Stipulation was subsequently obtained by the Plaintiff who reputiated the Stipulation, claiming that she did not agree to the Stipulation prior to her attorney having made his record before the Certified Shorthand Reporter, and she refused to sign. The Plaintiff however, did acquire subsequent increases in the payments received by her from her husband for child support, accepted and used those funds pending the Court's determination as to whether or not the settlement agreement should be approved. Defendant filed a Motion for an Order Approving and Enforcing Settlement Agreement. Judge Sawaya having heard the same, ordered the enforcement take place.

In Brown, 744 P.2d, 333, the Court of Appeals concluded that that which constitutes the Stipulation was as follows:

> "A promise or agreement with reference to a pending judicial proceeding, made by a party to the proceeding or his attorney, is binding without consideration. By statute or rule of course, such an agreement is generally binding only (a) if it is in writing and signed by the party or attorney, or (b) if it is made or admitted in the presence of the Court, or (c) to the

> extent that justice requires enforcement in view of a material change of position in reliance on the promise of agreement." Citing references from the restatement (2nd) of contracts, Section 94 (1981).

In our case, we meet none of those criteria. Our document is not signed, it was not admitted in the presence of the Court, and there has been no detrimental reliance. No funds have been transferred or increased nor loss of opportunity to litigaate on the merits the issues in question. In Brown, 744 P.2d, 333, the Court further states at page 334 and 335:

> "It has been said that unless it is clear from the record that the parties assented, there is no Stipulation, and it is provided in many jurisdictions, by rule of Court or by statute, that a private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, will not be enforced by the Court unless it is evidenced by a writing subscribed by the party against whom it is alleged or made, and filed by the clerk or entered upon the minutes of the Court. Any other rule would require the Court to pass upon the credibility of the attorneys."

As the Court indicates in Brown, 744 P.2d, 333, a meeting of the minds is critical to the question of whether or not a Stipulation has in fact been reached. In Jenson, 781 P.2d, 478, the Jensons themselves participated in the negotiation. A meeting of the minds apparantly existed or at least that was the indication from the preparation of the Stipulation following their face-to-face encounters. In Brown, 744 P.2d, 333, a meeting of the minds was the understanding of the Defendant, but the Plaintiff expressed no assent to the terms and conditions her attorney set forth before the Certified Shorthand Reporter, even though the attorney did so in his client's presence. Mrs. Brown explained that she was

shocked to the extent that she was incapable of responding or addressing the issue at that point, that she had not given authority to her attorney to engage in the conduct that he had engaged in, that her attorney was acting beyond the scope of his authority and without her approval and that she had no intention of entering into such a Stipulation. Some facts tend to support her contention, some facts tend not to support her contention as evidenced by the decent of Judge Orme. In our case presently on appeal, the negotiations were conducted between Dean Becker, attorney for the Defendants and Plaintiffs counsel. Those negotiations resulted in a written Stipulation, but one that was never signed by counsel for any of the parties or the parties themselves. In the case before us, there were no face to face negotiations between the Appellants, Howard Abrams, Liberty Vending Systems, Inc. and the Plaintiffs or their counsel. There was no opportunity for acquiescence or assent. There was no opportunity for reputiation until such time as the written instrument itself was produced and submitted for signature and approval. That approval and the signature evidencing the same was withheld because the parties did not agree to the terms and conditions contained within the written Stipulation apparently negotiated by their attorney. The very reasons for the existence of Rule 4-504(8) of the Code of Judicial Administration is to avoid the very conflict we have before the Court today and the responsibility of the Court to pass upon the credibility of attorneys.

In the case at bar, less personal contact and interaction between those upon whom this Stipulations' contents would bind or

cause performance and those with whom the performance is negotiated, existed then in either Brown, 744 P.2d, 333, or Jenson, 781 P.2d, 478.

POINT III

THE APPARENT CONFIRMATION OF THE EXISTENCE OF A STIPULATION IN THE CASE AT BAR FAILS TO RISE TO A LEVEL OF BINDING ASSENT BY THE PARTIES

The letter of March 22, 1991, directed from Plaintiff's counsel to Defendant's counsel, says, "This letter is to reflect the settlement that we seem to have reached in the above referenced case." [Emphasis added] And further says, "If I do not hear back from you, in writing by 4:00 p.m. today, I will assume that these general terms are as we have agreed, and that we have thus affected a settlement on these general terms." [Emphasis added]. This language is not language of definitive character, but language of presumption. It is not language acknowledging the existence of an agreement, but language assuming that an agreement has been reached or is about to be.

On March 22, 1991, Dean Becker, attorney for the Defendants, in a letter to Plaintiffs attorney, said, "With the above changes "the settlement is acceptable."" This language does not reflect the interaction, acquiescence, or assent of the Defendants themselves. This language does not reflect the existence of the meeting of the minds predicated upon a knowledgable and informed agreement made by the Defendants. This language is reflective of substantially less interaction or commitment than the standards that have been

required in Jenson, 781 P.2d, 478, or in the standards that were rejected in Brown, 744 P.2d, 333.

After the Plaintiffs attorney received Mr. Becker's communication, on March 23, 1991, he wrote to Mr. Becker and said, "Pursuant to the agreement we reached last week, enclosed is a General Release and Settlement Agreement, and a Promissory Note for your review and your clients execution in this matter . . . If I have not heard back from you, by the end of the week, I will assume that you are trying to get your clients to sign the documents." [Emphasis added]. The language of this March 23, 1991 letter again is language of presumption, not language of the recognition of a fact accomplished.

On April 11, 1991, the Plaintiffs attorney wrote Defendants counsel a letter and said, "I have made numerous telephone calls to you over the last two weeks, but have not heard back from you. I am assuming that the forms of our proposals are acceptable and that you are now obtaining the appropriate signatures." [Emphasis added]

In this case, the Plaintiffs attorney has presumed the Defendants into a Settlement Agreement, by self-serving memoranda. The Plaintiffs attorney has constructed a scenerio that the Plaintiffs have asserted constitutes a confirmed Settlement Agreement. In this case, the Defendants have not been heard from individually with regards to the issue of the terms and conditions of the settlement, their acceptabiliity, and the question of whether a meeting of the minds has been made. In this case, only a singular transmission from the Defendants attorney to Plaintiffs

counsel gives rise to any evidence of an affirmation or assent by the Defendants; and that affirmation or assent is made by Defendants counsel without any indication that the Defendants themselves have so agreed.

Again, this level of confirmation or assent is less than that previously rejected by this Court in Brown, 744 P.2d, 333. In that case, the attorney for Mrs. Brown made the record before the Certified Shorthand Reporter in her presence. In our case, Dean Becker provided a one sentence affirmation which merely caused to place in effect modifications of the Settlement Agreement then being negotiated, as opposed to an act by the attorney and representative of the Defendants designed to bind the Defendants and evidence the Defendants affirmation of or assent to the Settlement Agreement.

CONCLUSION

In conclusion, the Appellants respectfully submit that Judge Sawaya has errored in determining that the contact and conduct between the parties gives rise to a presumption of an assent or acceptance by the Defendants. Further the Judge has errored in finding a meeting of the minds between the parties. The Appellants respectfully submit that Brown, 744 P.2d, 333, is more closely identifiable with the facts of our case on appeal than is Jenson, 781 P.2d, 478, or any of the others wherein the Court has upheld an unsigned settlement agreement. The Appellants suggest that the Plaintiffs herein presumed and assumed the existence of a

Settlement Agreement, where in fact, little if any evidence exists that the Defendants accepted or assented to the terms or conditions contained in the written settlement instrument. Further, the Appellants suggest that the negotiations were not completed, to the extent that the Court can find an acquiescence or assent by the Defendants or their counsel to a binding settlement agreement. No dispute exists with regards to a proposed agreement having been read into the record by the Court or filed with the clerk; and accordingly, we are left with the single issue of determining whether or not the circumstances surrounding the negotiation rose to a level of a meeting of the minds or not. An immediate refusal by the Defendants to sign such an instrument evidences their lack of intent to enter into a Settlement Agreement. The language contained in Rule 4-504(8) in the Code of Judicial Administration and the standards set forth in Brown, 744 P.2d, 333 support the Appellants contention that no Settlement Agreement exists.

Respectfully submitted this 18th day of May, 1992,

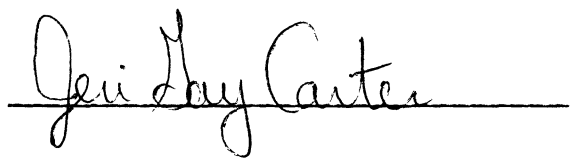
Wm. B. Parsons III

WILLIAM B. PARSONS III
Attorney for Defendant/Appellant

HAND DELIVERY CERTIFICATE

I do hereby certify that four (4) true and correct copies of the attached Appellant Brief was hand delivered this 18th day of May, 1992, to:

Bruce Goodmansen
Pro Se
2255 North University Parkway #15
Provo, Utah 84604



ADDENDUM

1. Notice of Appeal

2. Order Granting Motion to Enforce the Settlement Agreement

3. Final Judgment

4. Minute Entry dated May 22, 1991

5. Reply Memorandum in Support of Plaintiffs' Motion to Enforce the Settlement Agreement

6. Memorandum in Opposition to Motion to Enforce

7. Minute Entry dated May 8, 1991

8. Notice to Submit for a Decision

9. Request for Hearing

10. Motion to Enforce the Settlement Agreement

11. Memorandum in Support of Plaintiff's Motion to Enforce the Settlement Agreement. (The General Release and Promissory Note, and letters between counsel, representing Exhibits A through E, are included in the following order in the Index, out of sequence, because they were attachments to counsel's Memorandum as submitted to Judge Sawaya.)

12. Letter of March 22, 1991, from Barry G. Lawrence to Dean H. Becker (Exhibit A)

13. Letter of March 22, 1991, from Dean H. Becker to Barry G. Lawrence (Exhibit B)

14. Letter of March 25, 1991, from Barry G. Lawrence to Dean H. Becker (Exhibit C)

15. Promissory Note

16. General Release and Settlement Agreement

17. Letter of April 11, 1991, from Barry G. Lawrence to Dean H. Becker (Exhibit D)

18. Letter of April 19, 1991, from Barry G. Lawrence to Dean H. Becker (Exhibit E)

19. Letter of March 22, 1991, from Barry G. Lawrence to Dean H. Becker

20. Letter of March 21, 1991, from Barry G. Lawrence to the Honorable James S. Sawaya

21. Letter of March 21, 1991, from Barry G. Lawrence to the Honorable James S. Sawaya

22. Letter of March 21, 1991, from Barry G. Lawrence to Dean H. Becker

23. Letter of March 18, 1991, from Barry G. Lawrence to Dean H. Becker

24. Letter of March 7, 1991, from Barry G. Lawrence to Dean H. Becker

25. Answer

26. Amended Complaint

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Salt Lake City, Utah 84111
Telephone (801) 531-0494

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN Plaintiff, vs. LIBERTY VENDING SYSTEMS, INC. HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLAS GOFF Defendant.	NOTICE OF APPEAL Civil No. 900903355 CV Judge Sawaya

PURSUANT to the provisions of Rule 3 and Rule 4 of the Utah Rules of Appellate Procedure, the above Defendants, Howard Abrams and Liberty Vending Systems, Inc., as Appellants, give notice that they are appealing from the entire judgment rendered by the above-entitled Court, Judge Sawaya presiding, on the 6th day of June, 1991.

This appeal is taken from the Third District Court of Salt Lake County, State of Utah, and is taken to the Utah Court of Appeals.

Respectfully submitted this 5 day of July, 1991.

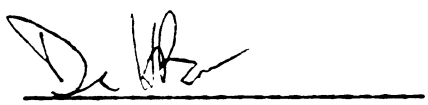
DEAN H. BECKER
Attorney for Defendants

MAILING CERTIFICATE

I certify that I mailed, postage prepaid, a true and correct copy of the foregoing Notice of Appeal to:

Barry Lawrence
Jones, Waldo & Co.
1600 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah

on the 5th day of July, 1991.



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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs, vs. LIBERTY VENDING SYSTEMS, INC., HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLASS GOFF, Defendants.	:	ORDER GRANTING MOTION TO ENFORCE THE SETTLEMENT AGREEMENT Civil No. 900903355CV Judge James S. Sawaya

Plaintiffs' Motion to Enforce the Settlement Agreement came on for hearing before the Court on Monday, May 20, 1991 at 2:00 P.M. Plaintiffs were represented by Barry G. Lawrence of the law firm of Jones, Waldo, Holbrook & McDonough and defendants Liberty Vending Systems, Inc. and Howard Abrams were represented by Ed Guyon.

The Court, having considered the memoranda and oral arguments of the parties, and being fully advised, hereby

ORDERS that the Plaintiffs' Motion to Enforce the Settlement Agreement is granted, and that judgment be entered as requested in Plaintiffs' Motion, on the terms and conditions of the Settlement Agreement reached on March 22, 1991 between the parties. It is therefore further

ORDERED that final judgment be entered against Howard Abrams, individually, and Liberty Vending Systems, Inc., jointly and severally, in the amount of $55,000 plus interest at a rate of 18% per annum from May 11, 1991, the date of the defendants' default under the Settlement Agreement. It is further

ORDERED that defendants pay to the plaintiffs $800 for the reasonable fees and costs incurred in having to bring plaintiffs' Motion to Enforce the Settlement Agreement pursuant to the Affidavit of Attorneys' Fees filed concurrently herewith.

ENTERED this _____ day of _____, 1991

BY THE COURT:

_____

James S. Sawaya
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this the 29 day of May, 1991, I caused to be hand-delivered, a true and correct copy of the foregoing ORDER GRANTING MOTION TO ENFORCE THE SETTLEMENT AGREEMENT, to the following:

Dean H. Becker, Esq.
349 South 200 East, #170
Salt Lake City, Utah 84111-3302

Ed Guyon
433 South 400 East
Salt Lake City, Utah 84111

bgl 1008/mj

Timothy C. Houpt (USB #1543)
Barry G. Lawrence (USB #5304)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Plaintiffs
1500 First Interstate Plaza
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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs, vs. LIBERTY VENDING SYSTEMS, INC., HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLASS GOFF, Defendants.	FINAL JUDGMENT Civil No. 900903355CV Judge James S. Sawaya

WHEREAS the Court has granted Plaintiffs' Motion to Enforce the Settlement Agreement that was reached by the parties on March 22, 1991, plaintiffs are entitled to have a judgment entered against the defendants Liberty Vending Systems, Inc. and Howard Abrams, jointly and severally, in this matter in the amount of $55,000.00 plus interest at a rate of 18% per annum from May 11, 1991 plus reasonable attorneys fees

and costs incurred by plaintiffs to enforce the settlement agreement. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in the amount of $55,000.00 plus interest at a rate of 18% per annum from May 11, 1991 until paid, plus $800 for reasonable attorneys fees and costs, against defendant Howard Abrams, individually, and defendant Liberty Vending Systems, Inc., jointly and severally, pursuant to the Settlement Agreement reached by the parties on March 22, 1991 and this Court's enforcement of that Agreement.

This judgment is final pursuant to Rule 54(b), Utah Rules of Civil Procedure, as to the plaintiffs' claims against Liberty Vending Systems, Inc. and Howard Abrams.

DATED this _____ day of _____, 1991.

BY THE COURT:

_____
Honorable James S. Sawaya
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this the 29 day of May, 1991, I caused to be hand-delivered, a true and correct copy of the foregoing FINAL JUDGMENT, to the following:

Dean H. Becker, Esq.
349 South 200 East, #170
Salt Lake City, Utah 84111-3302

Ed Guyon
433 South 400 East
Salt Lake City, Utah 84111

bgl 1010/mj

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
GOODMANSEN, BRUCE	:	
PLAINTIFF	:	CASE NUMBER 900903355 CN
	:	DATE 05/22/91
VS	:	HONORABLE JAMES S. SAWAYA
	:	COURT REPORTER
LIBERTY VENDING SYSTEMS	:	COURT CLERK STG
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

PLAINTIFF'S MOTION TO ENFORCE THE SETTLEMENT AGREEMENT HAVING BEEN HEARD BY THIS COURT AND THE MATTER OF THE COURT'S DECISION HAVING BEEN TAKEN UNDER ADVISEMENT. THE COURT HAVING CONSIDERED AND NOW BEING FULLY ADVISED IN THE PREMISES ORDERS SAID MOTION BE AND THE SAME IS HEREBY GRANTED.

CC: BARRY G LAWRENCE
ED GUYON

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Barry G. Lawrence (USB #5304)
JONES, WALDO, HOLBROOK & McDONOUGH
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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs, vs. LIBERTY VENDING SYSTEMS, INC., HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLASS GOFF, Defendants.	:	REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE THE SETTLEMENT AGREEMENT Civil No. 900903355CV Judge James S. Sawaya

Plaintiffs, Bruce Goodmansen and Wilma Goodmansen, respectfully submit this Reply Memorandum in Support of their Motion to Enforce the Settlement Agreement.

INTRODUCTION

On March 22, 1991, the plaintiffs reached a settlement agreement with the defendants through their respective counsel. Pursuant to that Settlement Agreement, Liberty Vending Systems, Inc., and Howard Abrams, individually ("Abrams"), are jointly liable for $55,000 in settlement of the plaintiffs' claims in this case. Although Abrams' counsel undeniably signed a March 22, 1991 letter agreement manifesting an intent to be bound by the terms of that agreement, Abrams now contends that the plaintiffs were "premature" in believing that an agreement was reached. The record clearly shows, however, that Abrams' previous counsel of record, was authorized to act on behalf of Abrams and thus bound both Abrams and Liberty Vending Systems, Inc.

ARGUMENT

I. A VALID AND BINDING SETTLEMENT AGREEMENT WAS REACHED.

Although Abrams' counsel, Dean Becker, executed a March 22 letter agreement manifesting an intent that Abrams be bound by the terms of the settlement agreement with plaintiffs, Abrams now argues that the plaintiff's contentions are premature. However, Abrams counsel reached an agreeable settlement with plaintiffs' counsel for $55,000. Under that agreement, Howard Abrams, both individually and on behalf of

Liberty Vending was to sign a promissory note made payable to the plaintiff Bruce Goodmansen. A letter agreement stating those terms was then signed by Abrams' counsel (See Exhibit A to the Plaintiff's Opening Memorandum.) It is thus undisputed that a written agreement was entered into by all parties through their counsel.

Notably, although Abrams now contests the validity of the Agreement, the plaintiff received neither a phone call nor written correspondence between the March 22nd settlement and April 20th (the date Abrams first payment was due) to inform them that Abrams disputed the terms of the settlement agreement. In any event, the March 22 letter agreement created a valid and enforceable settlement agreement which should bind both Abrams and Liberty Vending (see cases cited in plaintiffs' opening memorandum for the proposition that this court can enforce settlement agreements under these circumstances).

II. DEAN BECKER HAD THE AUTHORITY TO BIND ABRAMS.

Abrams also seems to argue that he did not authorize the settlement negotiations and thus cannot be bound by the agreement that was reached on March 22. However, the facts and the law dictate otherwise.

During settlement negotiations the plaintiffs proposed a payment schedule of $3,000 a month by the defendants. That schedule was modified several times at the request of Abrams and ultimately resulted in an initial $1,000 payment with payments of less than $3,000 for the first four months. Also, Abrams requested that the initial payment date be moved from April 1, 1991 to April 20, 1991 (see Exhibit B to plaintiffs' opening memorandum.) It is thus apparent that Abrams was informed of the terms of the settlement and was involved in negotiating its terms. Further his lack of diligence in questioning the terms of the settlement until after his first payment was due should prevent him from now disputing the validity of the settlement.

In any event, Abrams' prior counsel, Dean Becker, had actual authority to bind his clients to the settlement agreement. The case of Zions First National Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094 (Utah, 1988) aptly summarized this area of the law and stated that an agent, such as an attorney, can make its principal responsible for the agent's actions

> If the agent is acting pursuant to either actual or apparent authority. Actual authority incorporates the concepts of express and implied authority. Express

> authority exists whenever the principal directly states that its agent has the authority to perform a particular act on the principal's behalf. Implied authority, on the other hand, embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.

Id. at 1094-95. Furthermore, section 78-51-32 of the Utah Code gives an attorney the express authority to act on behalf of his client:

> An attorney and counselor has authority:
>
> 1) to execute in the name of his client a bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding or final judgment rendered therein.

Utah Code Ann. § 78-51-32 (emphasis added). See also Russell v. Martell, 681 P.2d 1193, 1195 (Utah, 1984) (wherein attorney's conduct was held attributable to his client "through principles of agency.")

Here, Dean Becker had actual authority to bind Howard Abrams, both by his express statutory authority as Abrams' attorney, and by his implied authority based upon his role as

counsel in negotiating the settlement of this case on behalf of Howard Abrams, which is "incidental to accomplish or perform" his duties as Abrams' legal counsel. See Zions at 1094. Accordingly, Mr. Abrams should not be excused from his obligations under the valid settlement agreement that was reached between the parties.

CONCLUSION

Accordingly, plaintiffs respectfully request that this court grant its Motion to Enforce the Settlement Agreement, and issue an Order and Judgment in the amount of $55,000.00 plus interest at a rate of 18% from the date of default, May 11, 1991, plus the plaintiffs' fees and costs incurred in seeking the enforcement of the settlement agreement.

DATED this 21st day of May, 1991.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Timothy C. Houpt
Barry G. Lawrence
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of May, 1991, I caused to be hand-delivered, a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL SETTLEMENT AGREEMENT, to the following:

Dean H. Becker, Esq. (mailed)
349 South 200 East, #170
Salt Lake City, Utah 84111-3302

Ed Guyon
433 South 400 East
Salt Lake City, Utah 84111

bgl 1005/sa

Edwin F. Guyon - 1284
counsel for defendants
433 South 400 East
Salt Lake City, Utah 84111
801/355-8811

THIRD DISTRICT COURT, SALT LAKE COUNTY, UTAH

BRUCE GOODMANSEN, et al

plaintiffs

vs.

LIBERTY VENDING SYSTEMS, et al

defendants

MEMORANDUM IN OPPOSITION TO MOTION TO ENFORCE

case no. 900903355 - CV
Judge James S. Sawaya

Defendant Howard Abrams, in response to plaintiff's motion to enforce settlement agreement, would show the court the following:

STATEMENT OF FACTS

1. On June 8, 1990 plaintiff's filed the complaint in the instant action.

2. On July 11, 1990 defendant Liberty Vending Systems, Inc. filed its answer to said complaint.

3. On July 11, 1990 defendant Abrams, in support of his motion to be dismissed, filed an affidavit stating therein, inter alia, that all transactions concerning plaintiffs were as a corporate officer of Liberty vending systems, Inc. and not as an individual. Defendant Abrams voluntarily withdrew said motion on August 4, 1990.

4. On July 26, 1990 defendant Howard Abrams filed his answer to said complaint.

5. On October 31, 1991 plaintiffs filed their amended

complaint

6. On December 5, 1990 a default judgment was entered against defendants Cascade Industries, Inc. and Douglass Goff. Subsequently motions to set aside judgment, for new trial and for reconsideration of motion to set aside judgment have been filed attacking said default judgment.

7. On December 11, 1990 all defendants filed an answer to plaintiff's amended complaint.

8. On January 21, 1991 plaintiffs filed their certificate of readiness for trial

9. On March 22, 1991 counsel for plaintiffs forwarded to counsel for defendants a letter (exhibit A to plaintiff's memorandum), said letter stating:

> This letter is to reflect the settlement that we seemed to have reached in the above-referenced case. [emphasis added]

and that:

> If I do not hear back from you, in writing, by 4:00 p.m. today, I will assume that these general terms are as we have agreed, and that we have thus effectuated a settlement on these general terms. [emphasis added]

10. On March 22, 1991 counsel for defendants forwarded to counsel for plaintiffs a letter (exhibit B to plaintiff's memorandum), said letter stating:

> With the above changes, the settlement is acceptable.

11. On March 23, 1991 counsel for plaintiffs forwarded to counsel for defendants a letter (exhibit C to plaintiff's memorandum), said letter stating:

> Pursuant to the agreement we reached last week, enclosed is a General Release and Settlement Agreement, and a Promissory Note for your review and your clients'

> execution in this matter. . . . If I have not heard back from you by the end of this week, I will assume that you are trying to get your clients to sign the documents. [emphasis added]

12. On April 11, 1991 counsel for plaintiff forwarded to counsel for defendants a letter (exhibit D to plaintiff's memorandum), said letter stating:

> I have made numerous telephone calls to you over the last two weeks, but have not heard back from you. I am assuming that the forms of our proposals are acceptable and that you are now obtaining the appropriate signatures. [emphasis added]

13. On April 23, 1991, plaintiffs filed their motion to enforce the purported settlement agreement.

14. Defendant Howard Abrams represents to current counsel that it was not anticipated that, as a part of any settlement agreement in the instant action, he would accept personal liability for the obligations of Liberty vending Systems, Inc. and that at no time was his prior counsel authorized to so represent.

15. On May 8, 1991, Edwin F. Guyon filed with the court his appearance as counsel for defendants Howard Abrams and Liberty Vending Systems, Inc.

MEMORANDUM OF LAW

1. While it may well be that the court has authority to "summarily enforce" a settlement agreement, Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 609 (Utah 1979); Zions First National Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478 (Utah 1989), such authority is to be limited in its exercise to only those agreements which are entered into pursuant to provisions of applicable law.

2. Notwithstanding holdings that the courts will enforce "oral settlement agreements" Lawrence Construction Co. v. Holmquist, 642 P.2d 382 (Utah 1982); Zions, supra. at 279-280, there must be such an agreement as a condition precedent to enforcement.

The facts of the instant action demonstrate the application of substantial pressure upon defendant Abrams' counsel in obtaining a purported settlement agreement, an agreement to which defendant Abrams has not subscribed. Plaintiff is premature regarding the existence of a valid settlement agreement as to defendant Abrams. The facts in the instant action do not demonstrate the existence of an enforceable agreement against defendant Howard Abrams.

Dated the 17th day of May, 1991.

By: Edwin F. Guyon
Edwin F. Guyon, counsel for defendants

I certify that on the above date a copy of the foregoing was mailed, first class, postage prepaid, to Timothy C. Houpt/Barry G. Lawrence, Jones, Waldo, Holbrook & McDonough, 170 South Main Street, #1500, Salt Lake City, Utah, 84101 and Dean H. Becker, 349 South 200 East, #170, Salt Lake City, Utah, 84111.

Edwin F. Guyon

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
GOODMANSEN, BRUCE	:	
PLAINTIFF	:	CASE NUMBER 900903355 CN
	:	DATE 05/08/91
VS	:	HONORABLE JAMES S. SAWAYA
	:	COURT REPORTER
LIBERTY VENDING SYSTEMS	:	COURT CLERK STG
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

PLAINTIFF'S REQUEST FOR HEARING HAVING BEEN SUBMITTED TO THE COURT PURSUANT TO RULE 4-501. COMES NOW THE COURT AND ORDERS SAID REQUEST BE AND THE SAME IS HEREBY GRANTED. ORAL ARGUMENTS ON PLAINTIFFS' MOTION TO ENFORCE THE SETTLEMENT AGREEMENT ARE SET FOR MAY 20, 1991 AT 2:00 PM

CC: BARRY G LAWRENCE
DEAN H BECKER
ED GUYON
HOWARD ABRAMS

Timothy C. Houpt (USB #1543)
Barry G. Lawrence (USB #5304)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Plaintiffs
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs, vs. LIBERTY VENDING SYSTEMS, INC., HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLASS GOFF, Defendants.	:	NOTICE TO SUBMIT FOR A DECISION Civil No. 900903355CV Judge James S. Sawaya

TO THE CLERK OF THE COURT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH:

PLEASE TAKE NOTICE, pursuant to Rule 4-501(1)(d) of the Utah Code of Judicial Administration, that the time for defendants to have filed a memorandum in opposition to Plaintiffs' Motion to Enforce the Settlement Agreement having passed, and all papers to be filed in connection with

Plaintiffs' Motion to Enforce the Settlement Agreement having been filed, that Motion may now be submitted to the court, the Honorable James S. Sawaya for a decision.

DATED this 7th day of May, 1991.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Timothy C. Houpt
Barry G. Lawrence
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of May, 1991, I caused to be mailed, postage pre-paid, a true and correct copy of the foregoing NOTICE TO SUBMIT FOR A DECISION, to the following:

Dean H. Becker, Esq.
349 South 200 East, #170
Salt Lake City, Utah 84111-3302

Ed Guyon
P.O. Box 17697
Salt Lake City, Utah 84117

Howard Abrams
2469 East 7000 South, Suite 100
Salt Lake City, Utah 84121

bgl 963/mj

Timothy C. Houpt (USB #1543)
Barry G. Lawrence (USB #5304)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Plaintiffs
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs, vs. LIBERTY VENDING SYSTEMS, INC., HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLASS GOFF, Defendants.	REQUEST FOR HEARING Civil No. 900903355CV Judge James S. Sawaya

Pursuant to local rule 4-501 of the Utah Code of Judicial Administration, Plaintiffs, Bruce Goodmansen and Wilma Goodmansen, by and through their undersigned counsel of record, hereby request oral argument on Plaintiffs' Motion to Enforce the Settlement Agreement.

DATED this 23rd day of April, 1991.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Timothy C. Houpt
Barry G. Lawrence
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of April, 1991, I caused to be mailed, postage pre-paid, a true and correct copy of the foregoing REQUEST FOR HEARING, to the following:

Dean H. Becker, Esq.
349 South 200 East, #170
Salt Lake City, Utah 84111-3302

Ed Guyon
P.O. Box 17697
Salt Lake City, Utah 84117

Howard Abrams
2469 East 7000 South, Suite 100
Salt Lake City, Utah 84121

_____

bgl 931/sa

Timothy C. Houpt (USB #1543)
Barry G. Lawrence (USB #5304)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Plaintiffs
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs, vs. LIBERTY VENDING SYSTEMS, INC., HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLASS GOFF, Defendants.	:	MOTION TO ENFORCE THE SETTLEMENT AGREEMENT Civil No. 900903355CV Judge James S. Sawaya

Plaintiffs, Bruce Goodmansen and Wilma Goodmansen, respectfully submit this Motion to Enforce the Settlement Agreement that was reached between the parties on March 22, 1991 and to enter judgment on the terms and conditions of that Settlement Agreement. The reasons for this motion are fully set forth in the supporting memorandum filed concurrently herewith.

DATED this 23rd day of April, 1991.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Timothy C. Houpt
Barry G. Lawrence
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of April, 1991, I caused to be mailed, postage-prepaid, a true and correct copy of the foregoing MOTION TO ENFORCE THE SETTLEMENT AGREEMENT, to the following:

Dean H. Becker, Esq.
349 South 200 East, #170
Salt Lake City, Utah 84111-3302

Ed Guyon
P.O. Box 17697
Salt Lake City, Utah 84117

Howard Abrams
2469 East 7000 South, Suite 100
Salt Lake City, Utah 84121

_____

bgl 929/sa

Timothy C. Houpt (USB #1543)
Barry G. Lawrence (USB #5304)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Plaintiffs
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Salt Lake City, Utah 84101
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs, vs. LIBERTY VENDING SYSTEMS, INC., HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLASS GOFF, Defendants.	:	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO ENFORCE THE SETTLEMENT AGREEMENT Civil No. 900903355CV Judge James S. Sawaya

Plaintiffs, Bruce Goodmansen and Wilma Goodmansen, respectfully submit this memorandum in support of their motion to enforce the Settlement Agreement that was agreed to, in writing, by all of the parties to this action on March 22, 1991.

INTRODUCTION

Following the March 18, 1991 pretrial in this matter, the parties entered into serious settlement negotiations to arrive at a resolution of this case before the trial date, scheduled for March 26, 1991. Accordingly, on March 22, 1991, the parties agreed to a settlement of this case, and to specific terms and conditions thereof, as evidenced by a letter agreement, in writing and signed by counsel for all parties. A formal release and Settlement Agreement, along with a Promissory Note, was forwarded to the defendants for their signature on March 25, 1991. Under that agreement the defendants were to make their first payment to the plaintiffs, in the amount of $1,000 on April 20, 1991. The April 20, 1991 deadline has come and gone and the defendants never conveyed any opposition to the documents proposed by plaintiffs' counsel, yet are now refusing to sign, or abide by the terms of, the Settlement Agreement and Promissory Note as they previously agreed.

Accordingly, the plaintiff requests that this Court enforce of the Settlement Agreement, pursuant to the terms agreed upon by the parties, and enter judgment on those terms and conditions.

STATEMENT OF FACTS

1. On March 18, 1991, a pre-trial conference was scheduled in this case. After that conference, and over the

next couple of days, the parties negotiated to reach a settlement in this case prior to the trial date scheduled for March 26, 1991.

2. By Friday, March 22, 1991, the parties tentatively agreed to a settlement whereby the defendant Howard Abrams would sign a $55,000 Promissory Note, as President of Liberty Vending and in his individual capacity, and would begin making payments on that note beginning with a $1,000 payment on April 1, 1991. It was also agreed that in the event of a default, the entire amount remaining on the Promissory Note would become due and owing at once. Furthermore, the parties agreed that only after the defendants fulfilled all of their obligations under the Promissory Note (by paying $55,000) would the plaintiff execute a satisfaction of judgment for the outstanding $81,000 judgment that had been entered against Doug Goff and Cascade Industries.

3. These terms were conveyed in a letter from Barry G. Lawrence, counsel for plaintiffs to Dean Becker, counsel for defendants. Upon receipt and review of plaintiff's counsel's March 22, 1991 letter, defendants' counsel, Dean Becker, agreed to those terms of settlement on behalf of all the defendants with two exceptions at the request of his client Howard Abrams, both of which were agreeable to the plaintiffs. Namely, that the April 1, 1991 payment date be changed to April 20, and that

the agreement reflect that a payment is "late" if paid within ten days after the date due, and is in "default" if not paid within ten days of the date due. Under those terms, defendants' counsel signed plaintiffs' March 22, 1991 letter, on a signature line, explicitly agreeing to its terms, subject to those exceptions. A copy of that letter signed by both parties' counsel is attached as Exhibit "A"). A copy of the letter sent by defendants' counsel concerning the two additional terms, is attached as Exhibit "B".

4. As the parties agreed to a resolution of this case, plaintiffs' counsel drafted a Promissory Note and General Release and Settlement Agreement pursuant to the terms that were previously agreed-upon and hand delivered those documents to defendants' counsel on March 25, 1991. In a cover letter, plaintiff's counsel requested that if the defendants had any questions or concerns regarding those documents, they should contact him at once. (A copy of the cover letter and the Settlement A reement and Promissory Note are attached as Exhibit "C".)

5. On April 1, 1991, plaintiffs' counsel telephoned defendants' counsel to make sure that the form of the Settlement Agreement and Promissory Note were acceptable. However, defendants' counsel never returned plaintiffs'

counsel's phone call. Similar phone calls were placed to defendants' counsel on Tuesday, April 2, 1991 and on Thursday, April 11, 1991, but no answer or reply was received.

6. As defendants' counsel did not return plaintiffs' counsel's calls, plaintiffs' counsel sent a letter to defendants' counsel on April 11, 1991, to make sure that the defendants would act in compliance with the Settlement Agreement and make their expected payment of $1,000 on or before April 20, 1991. (A copy of that letter, dated April 11, 1991, is attached as Exhibit "D").

7. As of April 19, 1991, neither plaintiff nor plaintiffs' counsel had heard from defendants or its counsel and thus again reiterated to defendants' counsel that it was expecting to receive a $1,000 check by April 20, 1991 in accord with the terms of the settlement that was reached. (A copy of that letter, dated April 19, 1991, is attached as Exhibit "E").

8. As of Monday, April 22, 1991, the plaintiff had not yet received defendants' check of $1,000 that was due on April 20, 1991, as agreed under the Settlement Agreement and was never told that the proposed documents were, in any way, objectionable. Furthermore, in a telephone conversation with defendants' counsel, Dean Becker, on Monday, April 22, 1991, it was learned that the defendants do not intend to abide by the Settlement Agreement.

ARGUMENT

Utah courts have repeatedly recognized that settlement agreements should be summarily enforced by the Court. As stated in Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 609 (Utah 1979):

> It is now well established that the trial court has power to summarily enforce on a Motion a Settlement Agreement entered into by the litigants where all the litigation is pending before it. Quite obviously, so simple and speedy a remedy serves well the policy favoring compromise, which in turn has made a major contribution to its popularity.

See also, Zions First National Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478 (Utah 1989).

Here, the parties clearly and unequivocally entered into a Settlement Agreement, the terms and conditions of which were fully and fairly agreed to by all of the parties, after consultation with their respective counsel. Now, however, the defendants do not want to honor that agreement. In such a circumstance as this, this court should summarily enforce the agreement on the terms and conditions as had been agreed to by the parties.

Here, although the actual General Release and Settlement Agreement has not been signed, the parties clearly agreed, both orally and in writing to a settlement of this case on terms of the Settlement Agreement. Under basic contract law, the parties entered into an agreement and should be bound by the terms of that agreement. Even in the absence of any writing, courts have upheld oral settlement agreements based on basic contract law. Lawrence Construction Co. v. Holmquist, 642 P.2d 382 (Utah 1982); Zions, 781 P.2d at 279-280. Clearly, in this case where the parties have agreed in writing to settle this case, they cannot now be permitted to refuse to acknowledge their obligations and responsibilities under that agreement.

Furthermore, it would be unfair and prejudicial to the plaintiffs if this court does not enforce the settlement agreement. Plaintiffs spent over $80,000 for vending machines in December 1989, and in return failed to receive machines that they could use to make money. This matter has been pending for about a year, and a trial date was set for March 26, 1991. Plaintiffs agreed to forego that trial date because they expected to receive money from the defendants as part of the agreed-upon settlement. Now, the plaintiff has not received money under the settlement agreement, and has not been able to

have its claims adjudicated at the scheduled trial date. In order to prevent additional harm to the plaintiffs, this court should enforce the settlement agreement at this time.

In addition, the terms of the Settlement Agreement provides that "In the event that either party to this Agreement commences legal proceedings to enforce any of the terms of the Agreement, the prevailing party in such action shall have the right to recover all reasonable attorneys' fees and costs from the other party." Exhibit "C" at p. 4. The defendants' failure to perform under the Agreement has forced the plaintiff to file the present Motion. As such, in accordance with the terms of the Agreement, plaintiff requests that it be awarded all costs incurred in bringing this Motion, including reasonable attorneys' fees for the briefing and arguing of this Motion.

Thus, as defendants' explicitly agreed to a settlement, and never lodged any objection to the form of settlement proposed by plaintiffs, plaintiffs respectfully requests judgment against the defendants, according to the terms of the Settlement Agreement and Promissory Note, as previously agreed to by the parties.

DATED this 23rd day of April, 1991.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Timothy C. Houpt
Barry G. Lawrence
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of April, 1991, I caused to be hand-delivered, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL SETTLEMENT AGREEMENT, to the following:

Dean H. Becker, Esq.
349 South 200 East, #170
Salt Lake City, Utah 84111-3302

Ed Guyon
P.O. Box 17697
Salt Lake City, Utah 84117

Howard Abrams
2469 East 7000 South, Suite 100
Salt Lake City, Utah 84121

_____

bgl 930/ab

JONES, WALDO, HOLBROOK & MCDONOUGH
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

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RONALD J. OCKEY
K. S. CORNABY†
JAMES S. LOWRIE
RONNY L. CUTSHALL
CHRISTOPHER L. BURTON
WILLIAM B. BOHLING
D. MILES HOLMAN
JOHN W. PALMER
CRAIG R. MARIGER
DAVID B. LEE*
BARRY D. WOOD*
TIMOTHY B. ANDERSON
SUZANNE WEST
ELIZABETH M. HASLAM
G. RAND BEACHAM
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BRUCE E. BABCOCK
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MERILYN M. STRAILMAN*§
TIMOTHY C. HOUPT

RICHARD H. WAYSDORF*
PAUL M. HARMAN
CLAUDE E. ZOBELL*+
ROBERT G. PRUITT, III
RONALD D. MAINES*
JAMES W. BURCH
BRYAN B. TODD±
KEVEN M. ROWE
MICHAEL PATRICK O'BRIEN
SHARON E. SONNENREICH
ANDREW H. STONE
JAMES W. PETERS
CURTIS R. WARD
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GREGORY CROPPER
BARRY G. LAWRENCE
MICHAEL J. KELLEY
DIANE ABEGGLEN
JEFFREY N. WALKER
JOHN C. STRINGHAM
DENO G. HIMONAS
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LISA A. JONES

OF COUNSEL
SIDNEY G. BAUCOM
LARRY C. HOLMAN
ROGER J. McDONOUGH
ALDEN B. TUELLER

*ADMITTED AND RESIDENT IN WASHINGTON, D.C.
† REGISTERED PATENT ATTORNEY
§ ADMITTED IN VIRGINIA
‡ LEAVE OF ABSENCE
+ ADMITTED IN NEVADA
± ADMITTED IN ARIZONA ONLY

SHEEKS & RAWLINS 1875
RAWLINS & CRITCHLOW 1891
RAWLINS, THURMAN, WEDGEWOOD & HURD 1897
RAWLINS, RAY & RAWLINS 1907
INGEBRETSEN, RAY & RAWLINS 1929
INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN 1941
INGEBRETSEN, RAY, RAWLINS & JONES 1948
RAY, RAWLINS, JONES & HENDERSON 1949

SALT LAKE CITY OFFICE
1500 FIRST INTERSTATE PLAZA
170 SOUTH MAIN STREET
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ST. GEORGE OFFICE
THE TABERNACLE TOWER BLDG.
249 EAST TABERNACLE
ST. GEORGE, UTAH 84770
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FACSIMILE (801) 628-5225

PARK CITY OFFICE
347 MAIN STREET
P. O. BOX 4065
PARK CITY, UTAH 84060
TELEPHONE (801) 645-8749

IN REPLY REFER TO:
Salt Lake City

March 22, 1991

IMMEDIATE RESPONSE REQUESTED
HAND DELIVERED

Dean H. Becker, Esq.
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Dean:

This letter is to reflect the settlement that we seemed to have reached in the above-referenced case. It is my understanding that we have agreed to the following general terms:

1. Howard Abrams will sign a $55,000 Promissory Note both as the President of Liberty Vending and in his individual capacity made payable to my client, Bruce Goodmansen. That Note is to be paid starting with a $1,000 payment on April 1, 1991, a $1,500 payment on May 1, 1991, a $2,5000 payment on July 1, 1991, and $3,000 payments on the first day of each month for the sixteen (16) months thereafter followed by a final payment of $2,000 due on November 1, 1992.

2. As we agreed, if your client defaults in making any monthly payment, the entire amount remaining on that $55,000 Note becomes due at once againt Howard and Libery Vending.

3. If your client makes timely payments for each of the next nineteen (19) months as agreed above, we will then execute a Satisfaction of Judgment for the $81,000 judgment against Doug Goff and Cascade Industries. If your clients default on their $55,000 Note, we will be able to execute on that judgment at once.

EXHIBIT "A"

Based upon our telephone conversations over the past few days, this is my understanding of the agreement we have reached in this case. If I have in any way misunderstood the agreement that we reached, contact me at once. I have left a place below for you to approve these general settlement terms. Once I have received your written consent as to this settlement, I will contact the court and let them know that we have agreed to a settlement in this case and that the Tuesday trial date will not be necessary. If I do not hear back from you, in writing, by 4:00 p.m. today, I will assume that these general terms are as we have agreed, and that we have thus effectuated a settlement on these general terms. Once again, if I have in any way misstated our settlement, contact me at once.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
Enclosure
cc: Bruce Goodmansen

DATED this 22 day of March, 1991.

Dean H. Becker
Counsel for Defendants

DEAN H. BECKER
Attorney at Law
349 South 200 East Suite 170
Salt Lake City, Utah 84111
Phone (801) 531-0494

March 22, 1991

Barry G. Lawrence
Jones, Waldo, Holbrook and McDonough
1500 First Interstate
170 South Main
Salt Lake City, Utah 84101

Re:Goodmansen v. Liberty

Dear Barry:

Your settlement letter of March 22, 1991 is acceptable with the following exceptions:

1. The April 1, 1991 payment is changed to April 20, 1991.

2. The provisions of paragraph 2 are modified to reflect that the payment is late after the 1st of the month and in default after the 10th, but that no judgment may be rendered without notice and hearing.

With the above changes, the settlement is acceptable.

Sincerely,

DEAN H. BECKER

DHB:me
cc:Liberty
enclosure

EXHIBIT "B"

JONES, WALDO, HOLBROOK & McDONOUGH

A PROFESSIONAL CORPORATION

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INGEBRETSEN RAY RAWLINS & JONES 948
RAY RAWLINS JONES & HENDERSON 949

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March 25, 1991

IN REPLY REFER TO
Salt Lake City

HAND DELIVERED

Dean H. Becker, Esq.
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Dean:

Pursuant to the agreement we reached last week, enclosed is a General Release and Settlement Agreement, and a Promissory Note for your review and your clients' execution in this matter. I believe that I have incorporated all of the terms we agreed per last week, however, if you have any questions or concerns regarding this settlement, please contact me at once. If I have not heard back from you by the end of this week, I will assume that you are trying to get your clients to sign the documents. I will be out of town the latter part of this week, so if I do not hear from you I will give you a call early next week. In any event, it is my hope to have this wrapped up by April 20, 1991 so that we are in accordance with the payment procedures we have agreed upon.

Thanks for your cooperation in this matter and give me a call if you have any questions concerning these documents.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
Enclosures
cc: Bruce Goodmansen w/encl.

EXHIBIT "C"

FILE

PROMISSORY NOTE

SALT LAKE CITY, UTAH

$54,000.00 April __, 1991

For value received, LIBERTY VENDING SYSTEMS, INC., and/or HOWARD ABRAMS, (the "Undersigned") jointly promise to pay to the order of Bruce Goodmansen ("Holder") 2255 North University Parkway, Suite 15, Provo, Utah 84601, or at such other place as the Holder may designate in writing, the sum of Fifty-Four Thousand Dollars and No Cents ($54,000.00), payable in monthly installments as follows: One Thousand Five Hundred Dollars ($1,500.00) due on or before May 1, 1991, Two Thousand Five Hundred Dollars ($2,500.00) due on or before June 1, 1991, monthly payments of Three Thousand Dollars ($3,000.00) thereafter, due on or before the first of each month from July 1, 1991 to and including October 1, 1992, and a final payment of Two Thousand Dollars ($2,000.00) due on or before November 1, 1992.

Undersigned agrees to pay to Holder, or any successor holder hereof, a late charge equal to Five Percent (5%) of any payment due pursuant to this Note which is made after the due date thereof. This note may be prepaid at any time.

This Note shall be considered in default if not paid when due, or if any payment hereunder is not paid on the due date or within ten (10) days thereafter, then the entire balance due hereunder shall become immediately due and payable, with the entire remaining balance to accrue interest at the rate of 18% per annum.

The undersigned shall be in default on the date when any of the following events occur: (a) upon Holder deeming itself insecure; or (b) upon the Undersigned's failure to make payment in the full amount at the time when and where the same become due and payable as aforesaid; or (c) upon the Undersigned's failure to perform any other obligation to the Holder, or (d) upon the death or insolvency (however evidenced) of the Undersigned, or (e) upon the commission of an act of insolvency or making of a general assignment for the benefit of creditors by the Undersigned, or (f) upon the filing of any petition or the commencement of any proceedings by or against the Undersigned for any relief under any bankruptcy or

insolvency laws, or any laws relating to the relief of debtors, readjustment of indebtedness, reorganizations, compositions or extensions; or (g) if any representation or warranty, whether oral or written, by the Undersigned to the Holder is materially untrue.

In the event of any such default, the Undesigned (a) agrees that the entire unpaid balance hereof shall, at the election of Holder and without notice to the Undersigned, be accelerated and become immediately due and payable; (b) agrees to pay to Holder all lawful collection costs and legal expenses including reasonable attorney's fees and court costs; and (c) agrees that any payments from whatever source shall first be applied to Holder's collection costs and legal expenses and then to interest and principal as aforesaid; and (d) agrees that the entire remaining balance shall accrue interest at the rate of 18% per annum. Liberty Vending Systems, Inc. and Howard Abrams, individually, shall be jointly and severally liable for all payments and late charges due under this note, and for all amounts due in the event of default by the undersigned.

Waiver of any default or late charge shall not constitute a waiver of any subsequent default or late charge. The provisions of this Note may be modified only by written agreement between Holder and the Undersigned and shall be binding upon the undersigned without notice to or consent of the undersigned without affecting or releasing the liability of the undersigned.

This Note shall be construed in accordance with and governed by the laws of the State of Utah. Any action to enforce this Note shall be brought within the State of Utah. The Undersigned stipulates and consents that it is subject to in personam jurisdiction in Utah with regard to this Note.

_____

Howard Abrams

LIBERTY VENDING SYSTEMS, INC.

By_____

Its_____

bgl 875/jf

GENERAL RELEASE AND SETTLEMENT AGREEMENT

This General Release and Settlement Agreement (hereinafter "Agreement") is entered into by and among Bruce and Wilma Goodmansen (hereinafter "plaintiffs"), and Howard Abrams, Douglas Goff, Liberty Vending Systems, Inc., and Cascade Industries, Inc. (hereinafter "defendants").

R E C I T A L S

WHEREAS, plaintiff filed a lawsuit entitled Bruce Goodmansen and Wilma Goodmansen v. Liberty Vending Systems, Inc., Howard Abrams, Cascade Industries, Inc. and Douglas Goff, Civil No. 9009023355 CV, now pending in the Third Judicial District Court of Salt Lake County (hereinafter "Lawsuit"), alleging claims against defendants arising from the payment by plaintiffs to the defendants for vending machines that plaintiffs alleged were non-conforming or never tendered.

WHEREAS, defendants Liberty Vending Systems, Inc. and Howard Abrams, in response to the Lawsuit filed against it, filed an answer denying the allegations of the Lawsuit.

WHEREAS, a default judgment was entered, and is currently unsatisfied, against defendants Douglas Goff and Cascade Industries, Inc. for Eighty One Thousand, Seventy Five Dollars ($81,075.00) for failing to respond to the Lawsuit (hereinafter the "Judgment").

WHEREAS, plaintiffs and defendants desire to compromise and settle the controversies and claims currently existing between them as set forth in the Lawsuit.

NOW, THEREFORE, in consideration of the mutual covenants set forth herein, it is agreed by the parties hereto as follows:

1. Upon defendants' delivery to counsel for plaintiff, no later than April 20, 1990, the sum of One Thousand Dollars and 00/100 cents ($1,000.00) and made payable to Bruce Goodmansen and Jones, Waldo, Holbrook & McDonough and a promissory note made payable to Bruce Goodmansen in the amount of Fifty-Four Thousand Dollars and 00/100 cents ($54,000.00) (hereinafter the "Promissory Note", a copy of the form of which is attached as Exhibit "A"), plaintiffs will delivery of an executed copy of this Agreement to the defendants.

2. If the defendants fully comply with all of the terms of this Agreement, and with all of the terms of the Promissory Note, without defaulting under the Promissory Note, upon the last payment by defendants under the Promissory Note, due on or before November 1, 1992, plaintiff's will execute a Satisfaction of Judgment for $81,075.00 in satisfaction of the Judgment currently outstanding as against Douglas Goff and Cascade Industries, Inc. and will also cause to be executed an

order of dismissal of the Lawsuit. If the defendants default on the Promissory Note, plaintiffs are entitled to immediately execute on the Judgment in addition to its rights under the Promissory Note.

3. All parties to this agreement shall bear their own costs and attorneys fees in relation to the lawsuit.

4. Plaintiffs hereby release defendants only from those causes of actions that currently form the basis of this Lawsuit.

5. All parties hereto warrant and represent that they have not sold, signed, granted or transferred to any other person, firm, corporation or entity, any claims, counterclaims, third party claims, demands, debts, obligations, actions or causes of action covered by the terms of this agreement or any part thereof which they have or claim to have against any person released hereto.

6. This Agreement is a compromise of disputed claims entered into in order to avoid the uncertainty of litigation. Neither this Agreement nor any payments made in connection herewith constitutes an admission of any liability or responsibility whatsoever on the part of any party in this lawsuit, it being agreed that each party specifically denies any such liability or responsibility and specifically denies all such allegations made against such party.

7. This Agreement, together with the exhibits attached hereto, contains the entire Agreement among the parties and may not be modified in any manner except by an instrument in writing signed by all the parties or their respective counsel.

8. In the event that any party to this Agreement commences legal proceedings to enforce any of the terms of this Agreement, the prevailing party in such action shall have the right to recover all reasonable attorneys fees and costs from the other party for such proceedings.

9. The signatories hereto represent and warrant that they have read this Agreement, that they are fully authorized in the capacity shown, that they understand the terms of this Agreement, and they have been advised of their legal rights by attorneys of their own selection. They execute this Agreement voluntarily and upon their best judgment, and solely for the consideration herein described.

10. This Agreement shall be interpreted, applied and enforced in accordance with the laws of the State of Utah. All parties knowingly and voluntarily submit to the personal jurisdiction of the courts of the State of Utah for purposes of any dispute arising out of this Agreement, including but not limited to any breach of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date hereinafter set forth.

LIBERTY VENDING SYSTEMS, INC. Date:_____

By_____

Its:_____

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the _____ day of _____, 1991, personally appeared before me _____, who, being by me duly sworn, did say that he is the _____ of Liberty Vending Systems, Inc., that said instrument was signed in behalf of said corporation by authority of its by-laws or a resolution of its board of directors, and said _____ acknowledged to me that said corporation executed the same.

_____
NOTARY PUBLIC
Residing at:_____

My Commission Expires:

_____

CASCADE INDUSTRIES, INC. Date:_____

By_____

Its:_____

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the _____ day of _____, 1991, personally appeared before me _____, who, being by me duly sworn, did say that he is the _____ of Cascade Industries, Inc., that said instrument was signed in behalf of said corporation by authority of its by-laws or a resolution of its board of directors, and said _____ acknowledged to me that said corporation executed the same.

_____
NOTARY PUBLIC
Residing at:_____

My Commission Expires:

_____

_____ Date:_____
Howard Abrams

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the _____ day of _____, 1991, personally appeared before me Howard Abrams, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

_____
NOTARY PUBLIC
Residing at:_____

My Commission Expires:

_____

_____ Date:_____

Douglas Goff

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the _____ day of _____, 1991, personally appeared before me Douglas Goff, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

_____
NOTARY PUBLIC
Residing at:_____

My Commission Expires:

_____

_____ Date:_____

Bruce Goodmansen

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the _____ day of _____, 1991, personally appeared before me Bruce Goodmansen, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

_____
NOTARY PUBLIC
Residing at:_____

My Commission Expires:

_____

_____ Date: _____

Wilma Goodmansen

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the _____ day of _____, 1991, personally appeared before me Wilma Goodmansen, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

_____
NOTARY PUBLIC
Residing at: _____

My Commission Expires:

_____

bgl 876/ja

JONES, WALDO, HOLBROOK & McDONOUGH

A PROFESSIONAL CORPORATION

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SHEEKS & RAWLINS	1875
RAWLINS & CRITCHLOW	1891
RAWLINS, THURMAN, WEDGEWOOD & MURO	1897
RAWLINS, RAY & RAWLINS	1907
INGEBRETSEN, RAY & RAWLINS	1929
INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN	1941
INGEBRETSEN, RAY, RAWLINS & JONES	1948
RAY, RAWLINS, JONES & HENDERSON	1949

* ADMITTED AND RESIDENT IN WASHINGTON, D.C.
† REGISTERED PATENT ATTORNEY
§ ADMITTED IN VIRGINIA
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PARK CITY OFFICE
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P. O. BOX 4065
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TELEPHONE (801) 645-8749

April 11, 1991

IN REPLY REFER TO:
Salt Lake City

HAND DELIVERED

Dean H. Becker, Esq.
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Dean:

It has been over two weeks since I forwarded our proposed Settlement and Release Agreement, and Promissory Note to you for your appproval and for your clients' signatures. I have made numerous telephone calls to you over the last two weeks, but have not heard back from you. I am assuming that the forms of our proposals are acceptable and that you are now obtaining the appropriate signatures. In any event, under the settlement agreement we reached, we are expecting a $1,000 Cashier's Check from your clients on or before April 20, 1991. Please contact me at once if you have any questions or concerns over this matter.

Thanks for your cooperation.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
cc: Bruce Goodmansen

EXHIBIT "D"

FILE

JONES, WALDO, HOLBROOK & McDONOUGH

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TELEPHONE (801) 645-8749

IN REPLY REFER TO:
Salt Lake City

April 19, 1991

HAND DELIVERED

Dean H. Becker, Esq.
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Dean:

I still have not heard back from you regarding the settlement of the above-referenced case. I am expecting to receive a signed Promissory Note and Settlement Agreement, along with a $1,000 check tomorrow, April 20, 1991. If I have not received the documents and check by Monday, April 22, 1991, I will make a motion to the court to compel our settlement agreement and will seek the appropriate fees and costs.

Please respond appropriately so that we are not forced to seek the court's intervention in this matter.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
cc: Bruce Goodmansen ~~(via fax)~~
mailed per Bruce G. 4/19/91

EXHIBIT "E"

FILE

JONES, WALDO, HOLBROOK & MCDONOUGH

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS

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IN REPLY REFER TO:
Salt Lake City

March 22, 1991

HAND DELIVERED

Dean H. Becker, Esq.
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Dean:

This letter is in response to your March 22, 1991 letter. After speaking with my client, we basically agree to those terms, as follows:

1. That in the event that payment is late (i.e., after the first of the month), a 5% interest charge will be placed on that payment. Default occurs if your client fails to pay within ten (10) days after payment is due.

2. We will agree that no judgment will be entered without notice to either Howard Abrams, Liberty Vending, or yourself. We cannot agree that a hearing will take place, particularly because the local rules do not provide for hearings in many circumstances.

3. We are willing to take the first payment (of $1,000) on April 20, 1991, in the form of a Cashier's Check. Thus, the Promissory Note will be for $54,000, the first payment being due thereunder on May 1, 1991 and continuing, as we previously agreed, through November 1, 1992.

I believe that these terms are agreeable with you and your client from our telephone conversations this morning. Please approve these terms where provided for below and I will tell the court that the scheduled trial date will not be necessary.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
Enclosure
cc: Bruce Goodmansen

DATED this ____ day of March, 1991.

Dean H. Becker
Counsel for Defendants

JONES, WALDO, HOLBROOK & McDONOUGH

A PROFESSIONAL CORPORATION

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IN REPLY REFER TO:

Salt Lake City

March 21, 1991

HAND DELIVERED

Honorable James S. Sawaya
Third District Court Judge
240 East 400 South
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.
Civil No. 90-3355CV

Dear Judge Sawaya:

Enclosed for your consideration please find a courtesy copy of the Reply Memorandum in Support of Plaintiffs' Motion to Compel Settlement Agreement that was filed today in the above-referenced matter. This matter was heard by the Court this past Monday afternoon.

Thank you for your consideration of this matter.

Very truly yours,

JONES, ~~WALDO,~~ HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
Enclosure
cc: Ed Guyon, Esq.
Dean H. Becker, Esq.

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INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN	1941
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IN REPLY REFER TO:
Salt Lake City

March 21, 1991

HAND DELIVERED

Honorable James S. Sawaya
Third District Court Judge
240 East 400 South
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Judge Sawaya:

As of 5:00 p.m. today, the parties in the above-referenced matter have been unable to agree to terms of settlement. Accordingly, the plaintiffs will be prepared for the trial that has been scheduled in this matter for this Tuesday, March 26, 1991 at 9:00 a.m.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
cc: Dean H. Becker, Esq.

JONES, WALDO, HOLBROOK & McDONOUGH

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RAWLINS, RAY & RAWLINS	907
INGEBRETSEN, RAY & RAWLINS	929
INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN	941
INGEBRETSEN, RAY, RAWLINS & JONES	948
RAY, RAWLINS, JONES & HENDERSON	949

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IN REPLY REFER TO:
Salt Lake City

March 21, 1991

HAND DELIVERED

Dean H. Becker, Esq.
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Dean:

As we have been unable to agree to a settlement in this case, I am forwarding the original of the attached letter to Judge Sawaya this afternoon. We fully intend to be ready, willing and able to go ahead with the trial in this matter this Tuesday.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
Enclosure

JONES, WALDO, HOLBROOK & McDONOUGH

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March 18, 1991

IN REPLY REFER TO:
Salt Lake Cit

HAND DELIVERED

Dean H. Becker, Esq.
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Dean:

After our conference with the judge this morning, I spoke with my client about the possibility of settling the above-referenced case. He stated to me that he would be willing to forego a down payment as we had originally proposed as long as your clients pay him $3,000 per month for the next twenty-three months bringing the total settlement amount to $69,000. In return, he would return to your clients all of the electrical machines which were the subject of the second contract between the parties. Additionally, we would demand a provision that states that if your client is late in paying, the entire remaining amount becomes due and owing, plus the outstanding $81,000 judgment becomes due and owing against all of the defendants. I am hopeful that you will agree that this is a reasonable offer to conclude this matter once and for all for all parties involved.

As we are scheduled to go to trial next Tuesday, I request that you respond to this offer by 5:00 p.m., Tuesday, March 19, 1991. If I do not hear back from you, I will assume that we are going ahead with the trial next week, and I will continue to pursue the $81,000

judgment against Doug Goff. Incidentally, I will prepare a list of further information I would like you to obtain for me from Doug Goff because, as I stated to you, I believe that many of his responses during our Supplemental Proceeding were insufficient, including information concerning Doug's wife's assets. In any event, I will be following up on this matter if we cannot agree to settlement by the end of the day tomorrow.

Once again, please contact your client and get back to me as soon as possible because if we do not hear from you by the end of the day tomorrow, we will begin to prepare for next Tuesday's trial. Accordingly, our settlement offer will necessarily increase by the amount of attorneys' fees incurred by my client thereafter.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
cc: Tim C. Houpt, Esq.
Bruce Goodmansen

JONES, WALDO, HOLBROOK & MCDONOUGH

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IN REPLY REFER TO:
Salt Lake Cit

March 7, 1991

HAND DELIVERED

Dean H. Becker, Esq.
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Re: Goodmansen v. Liberty Vending, et al.

Dear Dean:

I was unable to attend the hearing this past Monday in front of Judge Sawaya, but Tim Houpt told me that you and he had some settlement discussions wherein you made an offer in the neighborhood of $40,000 on the condition that Bruce return all of the electrical machines to you. Frankly, I am quite confused at that offer in light of the fact that you had previously offered $60,000 to Bruce if he returned the electrical machines in settlement discussions that we had last week. In any event, let me state my understanding of what transpired.

In a telephone conversation we had on the morning of Wednesday, February 27, you stated that your clients would be willing to settle this case if Bruce was to return all of the electrical machines to you, and your client could then sell those machines, pay the proceeds from those machines to Bruce, and then make up the difference, up to $60,000. I specifically made clear, and you agreed, that the $60,000 covered only the electrical machines that Bruce Goodmansen bought from your clients, and did not involve the return of the mechanical machines.

I presented that $60,000 offer to my client and then on Thursday, February 28, I presented you with our counter-offer. Under the terms of our counter-offer, we would return all of the electrical machines to your clients and they would pay Bruce Goodmansen $30,000 up front, plus $3,000 per month for twelve months, bringing the total settlement amount to $66,000. Additionally, I stated to you that in the event of a default, in order to protect my clients' interests, the then-judgment of $178,000 would become due and owing against all of the defendants. At the conclusion of our conversation, you stated that you would get back to me.

It is my understanding that you told Tim, prior to the hearing, that your client did not have the cash to make a $30,000 up-front payment and that Bruce then offered to take $66,000 at $6,000 a month (subject to the other terms of our prior offer).

I am informed that you then lowered your counter-offer from $60,000 to somewhere in the neighborhood of $40,000. Needless to say, I am very confused over the settlement posture of this case at this time and would request that you send me a letter or phone me to let me know whether your clients have agreed to our $66,000 counter-offer, or whether your original $60,000 offer was your client's final offer.

I look forward to a response at your earliest convenience.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Barry G. Lawrence

BGL/sm
cc: Tim C. Houpt, Esq.
Bruce Goodmansen

DEAN H. BECKER #261
Attorney for Defendant
433 South 400 East
Salt Lake City, Utah 84111
Telephone:801-531-0494

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN Plaintiffs vs. LIBERTY VENDING SYSTEMS, INC. HOWARD ABRAMS; CASCADE INDUSTRIES, INC., and DOUGLAS GOFF Defendants,	ANSWER Civil No.900903355 Judge: SAWAYA

Defendants answer the complaint of the Plaintiff as follows:

FIRST DEFENSE

Defendants fail to state a cause of action against the Defendants upon which relief may be granted.

SECOND DEFENSE

Defendants Abrams and Goff assert the affirmative defense of protection of the corporate entity protecting the individual defendants from liability to the Plaintiffs.

THIRD DEFENSE

Defendants Goff, Cascade and Abrams assert the affirmative defense of lack of privity of contract.

FOURTH DEFENSE

Defendants assert the affirmative defense of payment.

FIFTH DEFENSE

Defendants assert the defense of failure to mitigate damages in this matter.

SIXTH DEFENSE

Defendants assert the defense of breach of contract by the Plaintiffs and failure to undertaking the conditions precedent to a successful vending machine business.

SEVENTH DEFENSE

Defendants assert the defense of laches.

EIGHTH DEFENSE

1. Defendants are without sufficient information to form a belief concerning the allegations of paragraphs 1 and 2, and therefore deny the same.

2. Defendants admit that Abrams is a resident of the State of Utah; deny that he does business under the name of Liberty Vending Systems, Inc.; admits that he is a officer of Liberty; and admits he is an officer of Cascade.

3. Defendantss admit that Liberty is in the business of supplying vending machines, but denies that it finds locations for vending machines. Defendants state that Liberty Vending is the dba of a Nevada corporation under the name of Elite Acquisitions. Defendants deny that Liberty is the alter ego of Abrams.

4. Defendants admit that Goff is a resident of Salt Lake County; deny that he does business under the name of Cascade, admits that he has a responsibility to carry out business of Cascade as an officer of the corporation, and denies that at any time with respect to the instant suit that he has acted as an

officer of Liberty or Abrams.

5. Defendant states that Plaintiff is utterly confused regarding the entity of Cascade, and therefore denies the allegations of paragraph 6 of the complaint.

6. Defendants admit the allegations of paragraphs 7 and 8.

7. Defendants are unable to discern the relationship between the Plaintiffs and the intent of the Defendant Bruce Goodmansen (referred to below as Bruce), or the intent of the Defendant Wilma Goodmansen (referred to below as Wilma), and therefore deny the allegations of paragraph 9. The Defendants further deny that any copy of any agreement is attached to the complaint.

8. The Defendants are not aware of the reason for the Plaintiffs to contact the Defendant Liberty, nor are they aware of what facts are relied upon by the Plaintiffs, and therefore deny the allegations of paragraph 10.

10. Defendants are without knowledge concerning the allegation that a sales brochure referred to 50 vending machines, deny that statements recited in the paragraph 11 are found in any literature, and therefore deny the allegations of paragraph 11.

11. Defendants deny the allegations of paragraph 12, and affirmatively state that the Plaintiffs desired locations in Utah county, State of Utah, so that Bruce would be able to easily service the vending machines without excessive effort.

12. Defendants deny the allegations of paragraph 13 as the sales literature made estimates of possible income with numerous factors built into the estimates. In addition, the sales

literature is replete with disclaimers and statements that the information contained in the brochure is not a guarantee of profitability. Finally, the Defendants deny the allegedly verbatim statement of Goff, and deny each and every other allegation contained in paragraph 13.

13. Defendants admit that Wilma paid certain sums to Liberty Vending, but deny each and every other allegation of paragraph 14.

14. The Defendants admit that at least 50 machines were delivered to the Plaintiffs, and are without sufficient information to form a belief concerning the remaining allegations of paragraph 15.

15. The Defendants absolutely deny the allegations of paragraph 16, and state that the representations of the Plaintiffs in paragraph 16 are false, inaccurate and a complete and intentional misstatement of the truth.

16. Defendants deny paragraph 17 and 18, and affirmatively state that the Defendant Liberty Vending had no responsibility to locate, relocate, manage, operate, assist or lend a helping hand to the Plaintiffs, and any efforts to assist the Plaintiffs was a "Good Samaritan" effort which was a waste of the Defendant Liberty Vending's time due to the complete inability of the Plaintiffs to operate the business with any degree of competence.

17. Defendants are unaware of the Plaintiffs' wishes, and deny the allegations of paragraph 19.

18. Defendants have no knowledge of what information the

Plaintiffs allegedly relied upon, and deny the allegations of paragraph 20.

19. Defendants deny the allegations of paragraph 21 in that no Defendant represented that Liberty vending would replace the vending machines which the Plaintiffs had previously purchased.

20. Defendants are without information concerning the information which the Plaintiffs allegedly relied upon concerning the allegations of paragraph 22, and deny that the Second Agreement was to be governed by the same terms as the First Agreement.

Finally, the Defendants deny that they or any Defendant promised delivery on December 28, 1989 for an agreement allegedly signed on January 2, 1990.

21. Defendants admit that the Plaintiffs did pay a sum to the Defendant Liberty Vending, but without documentary proof of the bank draft, are unable to admit the allegations of paragraph 23.

22. The Defendants are without sufficient information to form a belief concerning the allegations of paragraph 24, and deny the same.

23. The Defendants deny the allegations of paragraph 25.

24. The Defendants affirmatively state that a simple adjustment in the vending machine apparatus increases or decreases the capacity of a vendng machine, and deny that the vending machines delivered to the Plaintiffs were not of sufficient capacity to meet the needs of the Plaintiffs; and deny the remaining allegations of paragraph 26 of the complaint.

25. Defendants deny the allegations of paragraph 27 of the complaint.

26. Defendants deny the allegations of paragraphs 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54.

Therefore, the Defendants pray that the complaint of the Plaintiffs be dismissed, that the Plaintiffs take nothing therefrom, and that the Plaintiffs be required to pay the reasonable attorney's fees of the Defendants for filing this frivolous and baseless action with the Court.

Dated this 11th day of December, 1990.

DEAN H. BECKER
Attorney for Defendants

MAILING CERTIFICATE

I certify that I mailed a true and correct copy of the foregoing Answer, postage prepaid, via United States Mail, on the 12 day of December, 1990, to:

Timothy C. Houpt
Barry G. Lawrence
JONES, WALDO, HOLBROOK & MCDONOUGH
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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

BRUCE GOODMANSEN and WILMA GOODMANSEN, Plaintiffs, vs. LIBERTY VENDING SYSTEMS, INC., HOWARD ABRAMS, CASCADE INDUSTRIES, INC. and DOUGLASS GOFF, Defendants.	:	AMENDED COMPLAINT Civil No. 900903355CV Judge James S. Sawaya

Plaintiffs Bruce and Wilma Goodmansen, through their attorneys, complain of the defendants, Liberty Vending Systems, Inc. ("Liberty"), Howard Abrams, Cascade Industries, Inc. ("Cascade"), and Douglass Goff (collectively the "defendants") and allege as follows:

PARTIES

1. Plaintiff Bruce Goodmansen is a resident of Provo, Utah County, Utah.

2. Plaintiff Wilma Goodmansen is a resident of Ontario, California.

3. Howard Abrams ("Abrams") is a resident of Salt Lake County, Utah, who, as far as can be determined by the plaintiffs, does business in Utah under the name of Liberty Vending Systems, Inc., has represented himself to be the president of Liberty, and is responsible for carrying out Liberty's business. Abrams is also an officer of Cascade.

4. Liberty is a business entity engaged in the business of supplying vending machines and finding locations for which to place the machines it supplies. Its principal place of business is in Salt Lake County, Utah. Liberty has represented itself to be a corporation, but is not registered to do business as a corporation under Utah law. Plaintiff therefore alleges, on information and belief, that Liberty is an alter ego of Abrams.

5. Douglass Goff ("Goff") is a resident of Salt Lake County, Utah, who, as far as can be determined by the plaintiffs, does business in Utah under the name of Cascade Industries, Inc., is the president of Cascade, is responsible for carrying out Cascade's business, and has, on occasion acted as an agent for Liberty and/or Abrams.

6. Cascade is a business entity engaged in the business of designing and supplying vending machines. Cascade was responsible for purchasing the vending machines from their manufacturers, and delivering them to Liberty and its customers, including the plaintiffs. Its principal place of business is in Salt Lake County, Utah. Cascade has represented itself to be a corporation, but plaintiff alleges, on information and belief, that Cascade is an alter ego of Goff, Abrams or Liberty Vending.

JURISDICTION AND VENUE

7. This court has jurisdiction of this action pursuant to Utah Code Ann. § 78-3-4 in that the amount in controversy exceeds the sum of $10,000, exclusive of court costs.

8. Venue is proper in this district pursuant to Utah Code Ann. § 78-13-4 in that the defendants reside in this district.

GENERAL ALLEGATIONS

THE FIRST CONTRACTUAL ARRANGEMENT

9. On or about October 12, 1989, plaintiff Bruce Goodmansen on behalf of himself and his mother, Wilma

Goodmansen, entered into an Equipment Acquisition Agreement with Abrams, purportedly on behalf of Liberty, to purchase 50, Model #6000 Liberty Vending Machines for a price of $795.00 each. (A copy of this "First Agreement" is attached hereto as Exhibit "A").

10. The plaintiffs entered into the First Agreement in response to, and in reliance upon, an advertisement placed by Liberty in the Deseret News in early October, 1989. The advertisement was used to solicit persons, such as the plaintiffs, to purchase 50 of Liberty's vending machines that were already at Salt Lake City locations.

11. The plaintiffs entered into the First Agreement also in reliance upon a sales brochure that stated that all 50 of the Model #6000 Liberty vending machines had, among other things, the following attributes:

(a) that they contained non-breakable windows, and a metal plate preventing access into the machine's inventory or money tray; and

(b) that they contain the "world's finest lock", with keys that cannot be duplicated.

12. The plaintiffs also relied upon Liberty's representation, as expressly stated in the First Agreement, that Liberty would "provide locations for all 50 of the vending

machines" purchased by the plaintiffs. Furthermore, Abrams orally represented that all of these locations would be in Salt Lake City and, in fact, Abrams represented to the plaintiffs that the locations that the plaintiffs would receive would be comparable to the Salt Lake City locations which had been shown to the plaintiffs, and upon which the plaintiffs relied.

13. In sales brochures and other documentation that Liberty, through Abrams, provided to the plaintiffs, it stated that the national average of net profits for each vending machine was $156 per month. The plaintiffs also relied upon representations made by Goff, who led the plaintiffs to believe that he was acting on behalf of Liberty as an employee or partner, and who told the plaintiffs that "there is no reason why you couldn't make a $10.00 weekly net profit per machine located by us."

14. On or about October 13, 1989, plaintiff paid, in full, the amount owing of $39,750.00 for the 50 vending machines purchased pursuant to the First Agreement. Pursuant to oral representations by Abrams, Liberty promised to deliver the 50 machines 7 days later, on October 20, 1989.

15. The 50 vending machines purchased pursuant to the First Agreement were tendered to the plaintiffs on or about November 20, 1989--later than expressly promised by

Liberty, through Abrams. Of those 50 machines, 10 were delivered with defective locking systems.

16. Additionally, although Liberty, through Abrams, promised the plaintiffs adequate money making locations in Salt Lake City for the 50 vending machines it purchased, Abrams instead, hired a locator to place all 50 machines in the Provo/Orem area, without the plaintiffs' knowledge. Neither Abrams nor Liberty verified or inspected many, if not all, of those locations. The plaintiffs, having seen the Provo/Orem locations, objected to the placement of their machines in such poor locations because they were not comparable to the Salt Lake locations that the plaintiffs had been shown and relied upon in entering into the First Agreement.

17. Subsequently, Abrams promised to move all of the vending machines from the undesirable Provo/Orem locations; thus, 31 machines were relocated to the Salt Lake City area. However, while en route, 8 machines were damaged by Abrams's son who was working on behalf of Liberty, and 8 machines were damaged by Abrams himself. Of the 8 machines damaged by Abrams, 6 have since been replaced by Liberty. Thus, since mid-January, 1990, 10 machines have been damaged and/or unaccounted for, and to this date remain idle.

18. Of the 19 vending machines remaining in the Provo/Orem area, 10 have yet to be relocated to Salt Lake City,

and have earned on the average, less than $2 per week in net profits. Of the 31 machines relocated in Salt Lake City, an average of 15 machines are averaging a net profit of $4 per week. Both figures are significantly lower than the national average as stated in both Liberty's and Abrams's representations and the representation by Doug Goff of at least a $10 weekly net profit per machine.

THE SECOND CONTRACTUAL ARRANGEMENT

19. In late December, 1989, the plaintiffs wished to purchase 35 additional vending machines, Model types 1300 and 2100.

20. In selecting these vending machine models, plaintiffs relied upon sales brochures that stated that the Model 1300 and Model 2100 Vending Machine had, among other things, the following attributes:

(a) that they contained a computerized accounting system;

(b) that the Model 1300 would hold 130 packages of candy and 35 packages of chips; and that the Model 2100 would hold 290 packages of candy and 35 packages of chips;

(c) that the batteries need replacing only every 1½ years; and

(d) that its anti-theft construction prevents tampering with the product or the money supply.

21. On or about January 2, 1990, Liberty, through Abrams, represented to the plaintiffs that Liberty would supply the plaintiffs with upgraded vending machines which had the same characteristics and attributes as the 1300 and 2100 Models, but could hold more packages of candy and chips than the originally agreed upon models. Specifically, Abrams agreed to supply Model 1600 machines in place of the Model 1300 machines, and Model 2600 machines in place of the Model 2100 machines.

22. On or about January 2, 1990, plaintiffs, relying on the representations and affirmations by Abrams, entered into a second agreement ("Second Agreement") with Liberty, for the purchase of 25, Liberty Model No. 1600 vending machines at $1,095 per unit, and 10, Liberty Model No. 2600 vending machines at $1,395 per unit. Both Abrams on behalf of Liberty, and the plaintiffs understood that this Second Agreement was to be governed by the same terms and conditions as the First Agreement, the only change being the model of vending machines purchased and the number of machines. Liberty, through Abrams, expressly promised that these 35 machines would be delivered by December 28th, 1989.

23. On or about January 2, 1990, plaintiffs paid, in full, the amount owing of $41,325.00 for the 35 vending machines purchased under the Second Agreement.

24. On or about May 16, 1990, plaintiffs received 7 of the 35 vending machines. All 7 were located in Salt Lake City and 3 of the machines were located next to other competing vending machines that hold a larger selection of vends.

25. The 7 vending machines that were delivered on May 16, 1990, contained no computerized accounting system as had been advertised, did not contain batteries that would last a year and a half as had been advertised, and did not hold the number of packages of chips and candy as had been advertised. As an example, Liberty represented that the Model 1300 could hold 130 packages of candy and 35 packages of chips, and that the Model 1600 could hold even more packages of chips and candy than the Model 1300. However, the Model 1600 holds only 90 packages of candy and 20 packages of chips.

26. Because of this problem with the vending machines' capacity, the plaintiffs have been and will be forced to service the machines more often than had been represented by Liberty, and are not, and will not be able to make the profit that had been represented to it, and which the plaintiffs

anticipated due to the fact that the machines will only allow the sale of a lesser number of goods.

27. As a direct result of the actions of Liberty and Abrams with respect to the First and Second Agreement (hereinafter the "Agreements"), plaintiffs have suffered direct economic losses of at least $40,170.00 associated with the lost profits of the improperly placed nonfunctional or delayed vending machines through May 1990. Additionally, at least $8,034 profits are lost by the plaintiffs each month as a direct consequence of Liberty's failure to supply the agreed upon vending machines.

FIRST CLAIM FOR RELIEF
(Breach of Contract: Liberty and Abrams)

28. The allegations of paragraphs 1 through 27 are incorporated herein by reference.

29. Liberty and Abrams breached the Agreements with the plaintiffs by inter alia:

(a) wholly failing to tender many of the agreed-upon vending machines;

(b) delivering some of the vending machines later than had been agreed upon;

(c) failing to provide adequate locations for the vending machines which would, as promised, enable

the plaintiffs to make the anticipated profit based on Liberty's, Abrams's and Goff's representations; and

(d) failing to provide vending machines with the characteristics and attributes advertised and represented by Liberty, Abrams, and Goff upon which the plaintiffs relied in entering into the Agreements with Liberty.

30. As a direct result of the breach of the Agreements by Liberty and Abrams as described above, the plaintiffs have suffered the economic injury and loss described above, and Liberty and Abrams are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

31. Pursuant to the terms of the Agreements, the plaintiffs are entitled to recover from Liberty and Abrams all costs of court, and all expenses arising out of or caused by this litigation pursuant to Utah Code Ann. 78-27-56.5, including reasonable attorneys' fees, on account of the necessity of enforcing the Agreements.

SECOND CLAIM FOR RELIEF
(Breach of Express Warranties: Liberty and Abrams)

32. The allegations of paragraphs 1 through 31 are incorporated herein by reference.

33. Liberty and Abrams breached express warranties that the vending machines it provided to the plaintiffs pursuant to the Agreements would be of the same quality as it had represented to the plaintiffs by affirmation of fact, promise and description, both orally and in writing, and that the vending machines would be in good and marketable condition, as required by Utah Code Ann. § 70A-2-313.

34. As a direct result of the breach of express warranties by Liberty and Abrams, the plaintiffs suffered the economic injury and loss described above, and Liberty and Abrams are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

THIRD CLAIM FOR RELIEF
(Implied Warranty of Merchantability:
Liberty and Abrams)

35. The allegations of paragraphs 1 through 34 are incorporated herein by reference.

36. Liberty and Abrams, as a supplier of vending machines, breached implied warranties of merchantability as a result of its delivery of vending machines which would not pass without objection in the trade or under the Agreement, and which are not fit for the ordinary purposes for which the machines are used, as required by Utah Code Ann. § 70A-2-314.

37. As a direct result of the breach of implied warranties of merchantability by Liberty and Abrams, the plaintiffs suffered the economic injury and loss described above, and Liberty and Abrams are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

FOURTH CLAIM FOR RELIEF
(Implied Warranty of Fitness for a Particular Purpose: Liberty and Abrams)

38. The allegations of paragraphs 1 through 37 are incorporated herein by reference.

39. Liberty and Abrams, breached their implied warranties of fitness for a particular purpose as required by Utah Code Ann. § 70A-2-315, because at the time it entered into the Agreements with the plaintiffs, Liberty and Abrams had reason to know the particular purpose for which the plaintiff purchased the vending machines, and that the plaintiffs relied on Liberty and Abrams to select the machines.

40. As a direct result of the breach of implied warranty of fitness for a particular purpose by Liberty and Abrams, the plaintiffs suffered the economic injury and loss described above and Liberty and Abrams are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

FIFTH CLAIM FOR RELIEF
(Breach of Express Warranties: Cascade and Goff)

41. The allegations of paragraphs 1 through 40 are incorporated herein by reference.

42. Goff and Cascade, acting as Liberty's or Abrams's alter ego, and/or as the supplier of vending machines to Liberty and its customers, breached express warranties that the vending machines it provided to Liberty and/or the plaintiffs would be of the same quality as it had represented to Liberty and/or the plaintiffs by affirmation of fact, promise and description, both orally and in writing, and that the vending machines would be in good and marketable condition, as required by Utah Code Ann. § 70A-2-313.

43. As a direct result of the breach of express warranties by Cascade and Goff, the plaintiffs suffered the economic injury and loss described above, and Cascade and Goff are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

SIXTH CLAIM FOR RELIEF
(Implied Warranty of Merchantability:
Cascade and Goff)

44. The allegations of paragraphs 1 through 43 are incorporated herein by reference.

45. Goff and Cascade, acting as Liberty's or Abrams's alter ego, and/or as the supplier of vending machines to Liberty and its customers, breached implied warranties of merchantability as a result of their delivery of vending machines to Liberty and/or the plaintiffs which would not pass without objection in the trade or under the Agreement, and which are not fit for the ordinary purposes for which the machines are used, as required by Utah Code Ann. § 70A-2-314.

46. As a direct result of the breach of implied warranties of merchantability by Cascade and Goff, the plaintiffs suffered the economic injury and loss described above, and Cascade and Goff are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

SEVENTH CLAIM FOR RELIEF
(Implied Warranty of Fitness for a Particular Purpose: Cascade and Goff)

47. The allegations of paragraphs 1 through 46 are incorporated herein by reference.

48. Goff and Cascade, acting as Liberty's or Abrams's alter ego, and/or as the supplier of vending machines to Liberty and its customers, breached their implied warranties of fitness for a particular purpose as

required by Utah Code Ann. § 70A-2-315, because Cascade and Goff had reason to know the particular purpose for which the plaintiff purchased the vending machines, and that the plaintiffs relied on Cascade and Goff to select the machines.

49. As a direct result of the breach of implied warranty of fitness for a particular purpose by Cascade and Goff, the plaintiffs suffered the economic injury and loss described above and Cascade and Goff are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

EIGHTH CLAIM FOR RELIEF
(Fraud and Misrepresentation: Abrams and Goff)

50. The allegations of paragraphs 1 through 49 are incorporated herein by reference.

51. The representations made by Abrams and/or Goff, as stated herein, concerned material facts bearing on the plaintiffs' purchase of vending machines from the defendants, which Abrams and Goff knew to be false or which were recklessly made, were made for the purpose of inducing the plaintiffs to enter into a contract for the purchase of vending machines, and the plaintiffs acted reasonably and in ignorance of their

falsity, and was in fact induced to rely on those statements, to their detriment.

52. As a direct result of the misrepresentations by Abrams and Goff, the plaintiffs suffered the economic injury and loss described above and Abrams and Goff are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

NINTH CLAIM FOR RELIEF
(Unjust Enrichment)

53. The allegations of paragraph 1 through 52 are incorporated herein by reference.

54. Through the plaintiffs' payment for the purchase of vending machines from the defendants, defendants have benefited in the amount paid by the plaintiffs, have at all times appreciated and acknowledged the benefit received from the plaintiffs, and have unfairly and unjustly retained benefits from the plaintiffs without having delivered the contracted-for vending machines to the plaintiffs.

55. As a direct result of the defendants' unjust enrichment, the plaintiffs suffered the economic injury and loss described above and the defendants are thus jointly and severally liable to the plaintiffs for all damages associated with that injury and loss.

WHEREFORE, plaintiffs demand a trial by jury and request relief, on each of the foregoing claims for relief, as follows:

1. Damages in the amount paid by the plaintiffs for the vending machines of $81,075.00, or alternatively.

a. tender to the plaintiffs all vending machines not yet delivered that operate according to the specifications as advertised and represented by Liberty and/or Abrams and/or Goff;

b. tender to the plaintiffs for all those non-conforming vending machines already delivered to plaintiffs, substitute vending machines that operate according to the specifications, as advertised and represented by Liberty and/or Abrams and/or Goff.;

c. repair or replace any and all nonfunctional vending machines already delivered but not presently operative; and

d. place all 85 vending machines in locations that will allow each machine to earn a minimum net profit of $10.00 per week.

2. Damages to the plaintiffs for lost profits in the amount of, at a minimum, $40,170.00, plus $8,034.00 per month,

at a minimum, from May 1, 1990 until judgment, or in such amount as is proven by the evidence at trial;

3. Any and all consequential damages suffered by the plaintiffs as a result of the defendants' breaches;

4. Punitive damages based on the defendants fraudulent and willful conduct;

5. Interest as provided for by law;

6. Attorneys' fees and costs of court as permitted by law;

7. Such other relief as the court deems just and appropriate.

DATED this 31st day of October, 1990.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Timothy C. Houpt
Barry G. Lawrence
Attorneys for Plaintiffs

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